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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1999

THE CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, RUDOLPH W. GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,

Petitioners,

-against-

LATINO OFFICERS ASSOCIATION, NEW YORK, INC., and ANTHONY MIRANDA, in his capacity as President of the Latino Officers Association, New York, Inc., on behalf of its members,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the balancing test formulated in Pickering v. Board of Education, 391 U.S. 563 (1968), for analysis of public employees' First Amendment rights, should the Court of Appeals have found that a municipal police department adequately showed that its strong interest in controlling public use of its uniform and insignia in parades, an interest recognized and upheld by this Court in Kelley v. Johnson, 425 U.S. 238 (1976), outweighed any potential minimal First Amendment interest of police officer members of an unrecognized fraternal organization in parading in uniform behind their organizational banner, where the marchers would be perceived as representing or endorsed by the police department, and numerous alternative means of communication were available to them?

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Petition For Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPINIONS BELOW

The unreported judgment from which petitioners seek certiorari was entered on October 6, 1999 and appears in the appendix at A1. The panel decision of the Second Circuit setting forth the reasons for the judgment, dated November 16, 1999, is reported at 1999 U.S. App. LEXIS 29970 and appears in the Appendix at A3-24. The June 10, 1999 opinion of the U.S. District Court for the Southern District of New York is reported at 1999 U.S. Dist. LEXIS 8782 and appears in the Appendix at A25-39.

CONSTITUTIONAL AND REGULATORY PROVISIONS

Amendments I and XIV to the United States Constitution are found in the Appendix at A40. The relevant portions of the written policy challenged by respondents are found in the Appendix at A41-42.

JURISDICTION

The Second Circuit issued its judgment on October 6, 1999 (A1). This Court has jurisdiction to review this judgment under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

This petition concerns a challenge to a policy of petitioner New York City Police Department ("the Police Department") that only fraternal organizations that have been officially recognized by petitioner Howard Safir, the New York City Police Commissioner ("the Commissioner"), which are subject to the supervision and control of the Police Department, may display the Department's uniform and other insignia in public parades ("the parade policy").

The regulation at issue states:

> All recognized organizations may use the name "New York City Police Department", and all of the associated logos, emblems, and banners, solely at the discretion of the Police Commissioner. Without official recognition, or other specific permission, the name or any associated logos, etc., may not be used. This authority and permission may be revoked at any time.

Personnel Bureau Memo No. 30 (May 13, 1998) ("PBM 30") (A41-42).

Under the parade policy, police officer members of fraternal organizations that the Commissioner has not officially recognized may march in parades behind their organizational banners, but not in police uniform. In addition, such members may march in parades in uniform behind the banner of any officially recognized fraternal organization. They may also engage in any other organizational and communicative activities that further their organization's goals.

As established by the record before the District Court, the reasons for the parade policy are as follows:

> 1. The Police Department views uniformed officers marching in parades as representing the Police Department itself. As such, the Department exercises supervisory control over such officers, through the medium of recognized fraternal organizations, both with respect to their presentation of the Police Department uniform and insignia and the officers' conduct while in uniform, including the statements--through words or actions--made by such officers.
>
> 2. The Police Department extends assignment and leave privileges to officers to march in parades behind the banners of officially authorized fraternal organizations. Therefore, administrative concerns support limiting the number of officially recognized fraternal organizations which may sponsor parade participation to those representing constituencies not already represented.
>
> 3. In that the Police Department seeks to foster harmony among its members,

> allowing an organization that competes with an already recognized fraternal organization serving the same constituency to march in police uniform behind its organizational banner is inconsistent with Departmental policy.

Relief Sought in the Complaint

Respondents Latino Officers Association, New York, Inc. ("Latino Officers") and its President, Anthony Miranda (collectively, "respondents"), brought this action in 1997 to challenge, as an alleged application of inconsistent standards and denial of Equal Protection, the Commissioner's refusal to recognize Latino Officers as an official fraternal organization within the Police Department. Such organizations are permitted to use Police Department facilities for fund raising and organizational meetings, to recruit members among trainees at the police academy and to have their own members (and any other police officers) march in uniform in parades behind their organizational banners.

While the legality of the Police Department's recognition policy is not at issue on this petition, it was respondents' challenge to that policy that gave rise to respondents' independent challenge to the parade policy.

The purpose and function of recognized fraternal organizations is described in PBM 30 (A41):

> Throughout the history of the New York City Police Department [religious], fraternal, and ethnic organizations have served to promote the ideals and goals integral to the success of the mission of the Department. To ensure that these organizations serve the best interests of the Department, guidelines have been created whereby such organizations will be officially recognized. To be officially recognized by the

> Department, the purpose or mission of the organization must be consistent with the goals and mission of the New York City Police Department.

Latino Officers was formed in early 1996 to represent Police Department members of Hispanic/Latino descent, in particular, to combat alleged discrimination against such officers. The organization was formed by dissident members of the Hispanic Society, an already recognized fraternal organization, in that the founders of Latino Officers perceived that the Hispanic Society had a social rather than an activist focus.

The Police Department has not recognized Latino Officers as an official fraternal organization in the Department, because the Hispanic Society represents the very same constituency that Latino Officers seeks to represent. The Department encourages members of the same broad constituency to work within an already recognized fraternal organization representing that constituency to achieve their members' common goals. The purpose of that policy is "to promote harmony within the Department, discourage rivalries between groups of officers and conserve the resources of the Department hierarchy in meeting with and supervising the activities of recognized organizations" (A41).

After Latino Officers again sought the Commissioner's official recognition in May 1999, which was again denied on the same ground asserted previously, respondents' challenge to the Police Department's recognition policy was tried in District Court in a November 1999 bench trial. That Court did not in any manner address the parade policy. The case concerning the recognition policy has not been finally submitted to the District Court, in that respondents' post-trial brief has not yet been filed.

Request for Preliminary Injunction Against Parade Policy

Although the complaint did not specifically address the parade policy, after filing the complaint, respondents sought four preliminary injunctions against application of that policy so as to bar Latino Officers, as an unrecognized fraternal organization, from having its members march in uniform behind its banner in parades. See A9 n.4, A26-27.

For reasons not pertinent here, the first three District Court rulings on respondents' applications for preliminary relief were not reviewed by the Court of Appeals.

Respondents moved for preliminary injunctive relief against the parade policy for the fourth time in May 1999, asserting that petitioners' barring them from marching in uniform behind their banner violated their First Amendment rights.

District Court Injunction Against Parade Policy

Addressing only the parade policy, the District Court concluded in June 1999 that respondents were likely to succeed on the merits of their challenge to that policy and enjoined petitioners from barring respondent Latino Officers from having its members march in uniform behind its banner (A32-39).[1]

The District Court, we believe incorrectly, applied the most stringent test for review of employee speech under the First Amendment, which this Court applied in United States v. National Treasury Employees Union, 513 U.S. 454 (1995) ("NTEU"), on the ground that "the restraint at issue prohibits speech before it occurs"(A34). The District

[1] In fact, there was no challenge on the "merits" to the parade policy. The complaint did not address the parade policy, but merely the policy on recognition of fraternal organizations. The only challenge to the parade policy was brought up in the motion for a preliminary injunction.

Court accordingly held that, to justify the challenged policy, the Police Department had to show that real and not conjectural harm would follow if the parade policy were struck down and that the absence of the policy would necessarily impact actual governmental operations (A34, A36-37).

The Court rejected out of hand petitioners' assertion that the Departmental uniform and insignia is a nonpublic forum over which petitioners may exercise control to assure their use to further Departmental objectives (A34). The District Court thereafter effectively eviscerated the Police Department's primary defense of the parade policy--the need to control the use of its primary symbol of organizational authority--by improperly finding that defense irrelevant under NTEU.

The District Court then found that the message of public concern that Latino Officers wished to express by marching in uniform behind their own organizational banner was not only that they were proud to be Latino police officers, but that they were willing to criticize the Police Department publicly for alleged discrimination against persons of Hispanic/Latino descent (A35-36).

Considering the Department's remaining concerns, the Court rejected as insufficient indicators of "harm" and, thereby, justification under NTEU for the parade policy, petitioners' interests in maintaining Departmental harmony and conserving administrative capacity (A36-39). The Court held that the Department had not specifically shown either how disharmony would follow from having competing police organizations march in parades or "how much" additional time and effort would be required to review and muster Latino Officers members prior to their participation in parades behind their own organizational banner (A37-38).

The District Court accordingly granted a preliminary injunction against the Police Department's prohibiting Latino Officers' members from marching in

uniform behind their own organizational banner in five upcoming parades (A39).

Court of Appeals Injunction Against Parade Policy

The Court of Appeals granted a broader preliminary injunction against the "parade policy," rather than just ordering that respondents could march in certain parades, agreeing that respondents had demonstrated a likelihood of success on the merits of their claims that the Police Department's parade policy violated their First Amendment rights.[2]

Approving application of NTEU, the Court of Appeals rejected petitioners' view that the traditional Pickering balancing test would more appropriately permit a fair assessment of the Department's need to control the off-duty use of its uniform and insignia (A12-16). The Court then held that respondents' interest in wearing their uniforms in parades met at least "minimal standards for triggering First Amendment concerns" (A16-19). The Court also found that, because those viewing the parades would already know Latino Officers' well-publicized views on police-related issues from extensive prior articles and media attention to that organization, their wearing police uniforms in parades would add force to their message (A17).[3] The Court also found that their bare message of pride in Latino heritage was of public concern (A18).

The Court of Appeals next found that respondents' interests in communication were not outweighed by a showing by petitioners in support of the parade policy of a

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[2] As was true of the District Court, it did not trouble the Court of Appeals that there were no such allegations "on the merits."

[3] The record before the Court of Appeals included 78 news stories about Latino Officers covering the period from June 1996 to April 1999.

"necessary impact on the actual operation of the Government" if the parade policy were struck down, swiftly rejecting as insufficient petitioners' interests in Departmental harmony and administrative burden (A19-20).

Considering petitioners' need to control the use of Departmental symbols and prevent the misleading impression that a certain unauthorized group speaks for the Department, the Court of Appeals conceded the Police Department's "strong interest in maintaining control over how its uniform and symbols are used" (A20). The Court nevertheless concluded that the Department had not justified the parade policy's allowing police officers to march behind the banners of recognized, but not of unrecognized, fraternal organizations, in that such organizations were, in the Court's view, "similarly situated" (A21).

While agreeing that the government may regulate the speech of its employees in a manner that would be unacceptable as applied to private individuals, the Court also rejected out of hand petitioners' contention that, when the public sees a large number of police officers marching in official police uniforms, the public would be likely to believe that the Police Department itself was speaking (A23).

The Court of Appeals, therefore, enjoined the parade policy (A24).

REASONS FOR GRANTING THE PETITION

The issues the petition presents have nationwide importance to the many local police departments with policies governing the use of their uniforms and insignia. Those policies serve substantial governmental interests in protecting the use of symbols of authority that are critical to preserving public safety and civic order. At the same time, the policies do not infringe on public employees' limited First Amendments rights to speak and the public's

concomitant rights to hear their commentary on issues of public importance.

We respectfully urge that certiorari be granted because the Court of Appeals erroneously invalidated the challenged parade policy in a manner that,

(1) misapplies this Court's holding in NTEU in a situation that bears no resemblance to the facts presented in that case, rather than using the Pickering balancing test, which would permit appropriate deference to the Police Department's institutional interests as a quasi-military, law enforcement agency, as recognized in Kelley v. Johnson, supra;

(2) conflicts with this Court's decision in Rust v. Sullivan, 500 U.S. 173, 194, 196-200 (1995), that the government does not violate the First Amendment by regulating the content of what is or is not expressed in the future, when it is the speaker by virtue of its funding of activities and enlists private entities to convey its message; and

(3) conflicts with this Court's reasoning in Goldman v. Weinberger, 475 U.S. 503, 507 (1986), that "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."

I.

CERTIORARI SHOULD BE GRANTED TO RECTIFY THE FEDERAL COURTS' UNWARRANTED INTERFERENCE WITH A MUNICIPAL POLICE DEPARTMENT'S CONTROL OF ITS UNIFORM AND INSIGNIA AND INTERNAL MANAGEMENT OF ITS FRATERNAL ORGANIZATIONS AND TO CLARIFY THE PROPER STANDARD OF FIRST AMENDMENT REVIEW WHERE SUCH CRITICAL AND TRADITIONALLY LOCAL ACTIVITIES ARE CHALLENGED IN FEDERAL COURT.

This Court should hear this case because the federal injunction against petitioners' parade policy constitutes an unwarranted federal judicial interference in petitioners' control of the display of its police uniform--its primary symbol of authority--and internal management of the activities of its fraternal organizations.

The precedent established by this case directly conflicts with traditional concepts of full control by military and police administrators of the use of their uniforms and insignia. It also creates a dangerous precedent that threatens to erode critical police management discretion, when effective discipline and clear and respected lines of command are absolutely necessary in quasi-military agencies that must respond to crime, emergencies and threats to civic order.

The federal courts misapplied this Court's precedents to strike down the Police Department's important and reasonable policy on the use of its uniform in parades where no clear First Amendment right was demonstrated. Even if there were, arguendo, some conceivable First Amendment interest in an officer's expressing personal messages of public concern while in uniform. moreover, the members of Latino Officers who wished to march in uniform behind their organizational banner have available--and have vigorously utilized--

multiple alternative avenues to communicate their views about the Police Department. The Department's interests in regulating the use of its uniform, therefore, and controlling the messages communicated by groups of officers marching and displaying that uniform, far outweigh individual officers' interest in wearing that uniform while marching in a parade behind the banner of their organization.

A. The Erroneous Decision of the Court of Appeals Is In Effect A Final Order Barring Petitioners' Parade Policy, Which May Utterly Evade This Court's Review If Not Addressed At This Time.

While we recognize that this Court rarely reviews interlocutory decrees, see, e.g., Myers v. Bethlehem Corp., 303 U.S. 41, 52 (1938), the judgment sought to be reviewed is, in effect, a final adjudication on petitioners' parade policy.

In that the complaint does not address the parade policy, there may be no further decision on it in this litigation. In any event, the Court of Appeals broadly enjoined "the parade policy," without limiting the injunction to respondents or the particular parades they wished to join (A24). The Court of Appeals also left no unresolved question on the legality of the parade policy, either for this litigation or for potential future cases. In addition, review at this time would conserve judicial resources, because the parade policy is challenged every year and often evades full appellate review due to the expedited nature of the proceedings. See Los Angeles v. Lyons, 461 U.S. 95, 101 (1983); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 179 (1968).

The trial that has been held on respondents' challenge to the recognition policy, which was before a different federal judge from the judge who enjoined the parade policy, did not in any manner address the parade

policy. Even if petitioners' defense of the recognition policy succeeds at trial and is upheld on appeal, the injunction against the parade policy will, therefore, retain independent validity, because the decision concerning the parade policy is separate from resolution of whether petitioners fairly applied their recognition policy to Latino Officers.

If, on the other hand, the trial and appeal on the recognition policy result in a conclusion that petitioners must recognize Latino Officers as a fraternal organization, the ban on the parade policy would also still be in effect. Latino Officers could then muster uniformed officers behind its banner in parades as a recognized fraternal organization. Any other unrecognized fraternal organization, however, could rely on the Circuit's ruling on the parade policy to assert the right to assemble uniformed New York City police officers behind its banner, no matter how repugnant to or inconsistent with Departmental policies and interests the views of that organization might be.

In that there is no certainty that a more technically final judgment will ever be entered on the parade policy than is now in effect, petitioners seek certiorari now to avoid very possibly losing forever the opportunity to have this erroneous decision corrected, and to protect their right to control their uniform as well as run their own internal affairs. This issue is too important for petitioners to run the risk that no further review of the parade policy would be possible.

One additional consideration warranting review at this time is that, even if, arguendo, one could anticipate the potential of entry of a final judgment on the parade policy, it would not be obtained until well into the next year. By that time, next year's season of public parades in New York City will fast approach if not already have commenced. Further duplicative litigation in the District Court and Court of Appeals will not provide a different result or fuller

record for this Court's review than that now presented. To avoid such unnecessary burden on the federal system due to controversy over petitioners' powers, petitioners now seek definitive resolution of the important issue presented concerning their control of their police uniform and management of their affairs.

To recapitulate, the judgment that has been rendered, while preliminary in name, should be reviewed at this time in that it has all the effect of a permanent injunction, given both the breadth of its ruling and its total separability from the issues presented by the underlying action and heard at trial. Further, as noted above, this Court has, in appropriate circumstances, which we believe are present here, granted certiorari to review the erroneous grant of a preliminary injunction.

B. The Court of Appeals Erred in Striking Down Petitioners' Parade Policy By Applying Too Stringent a Standard of Review and Improperly Failing to Defer to the Police Department's Need to Reasonably Regulate the Use of Its Uniform and Insignia.

The decision sought to be reviewed creates a dangerous precedent for erosion of local police departments' control of the use of their uniforms and insignia.

It Is Improper To Require a Showing of Actual Harm In Defense of A Reasonable Rule Prohibiting Unauthorized Use of a Police Uniform.

In NTEU, supra, 513 U.S. 454, this Court held that the government had to show how a ban on honoraria to federal employees for any speeches or writings was necessary to avoid actual harm to government operations. The federal government could not make such a showing, and the ban was struck down.

In this case involving a Police Department's control of the future use of its uniforms and insignia, a very different scenario is presented that requires a different test for legality, despite the ex ante nature of the subject regulation. The similarity that in NTEU the federal employees would present their speeches and writings in the future and that, in this case, officers would wear their uniforms in the future, as the lower courts reasoned, does not provide a sufficiently tailored analytical rubric to warrant using the same constitutional test to assess both situations. While in both instances the government has addressed an issue ex ante a potential expression, that is only because they both involve government rules of general application. More specific analysis is required to address the issue of the appropriate measure of legality, however, where two such different types of rules are at issue. As was well stated by the Seventh Circuit in Zook v. Brown, 748 F.2d 1161, 1165 (7th Cir. 1984), "In view of the enormous variety of circumstances in which statements by public employees may be thought by their superiors to furnish the grounds for personnel action, the Supreme Court has deemed it inappropriate and infeasible 'to attempt to lay down a general standard against which all such statements may be judged,'" (quoting Pickering).

In this case, it can properly be presumed that the government is harmed by the banning of its parade policy, thereby satisfying NTEU even if it did apply, in that its authority is necessarily eroded when its limitations on the use of its uniform and insignia are eliminated. This Court recognized in Kelley v. Johnson that "deference is due [a locality's] choice of an organizational structure for its police force." 425 U.S. at 246. The proper issue to be considered is whether the Department's rule is based upon standards that are reasonably necessary in managing a large multi-ethnic municipal police department, not whether every instance of the rule's violation will necessarily cause actual harm to the Department's operations.

The record in this case fully documents the strict controls the Police Department places on the use of its uniform. Indeed, misuse of that uniform is a crime in New York State. N.Y. Penal Law § 190.26. There are also ample federal authorities recognizing the need for strict military control of uniforms and insignia. E.g., Goldman v. Weinberger, supra, 475 U.S. 503, 508. The Police Department has been recognized to be a quasi military organization. Caruso v. Ward, 72 N.Y.2d 432, 439 (1988). Given the daily nature of the activities of any local police force, the importance of local control of the use of a police uniform certainly is not of lesser importance than the interest of the federal military in similar control in the public interest.

It is, thus, not a justifiable rule of law to require a Police Department to demonstrate actual harm to the government from a use of the police uniform by unauthorized groups of police officers, who have banded together to pursue their own goals, both personal and political. As this Court held in Kelley v. Johnson, "Choice of organization, dress, and equipment for law enforcement personnel is a decision entitled to the same sort of presumption of legislative validity as are state choices designed to promote other aims within the cognizance of the State's police power." 425 U.S. at 247.

The Police Department has decided that, to avoid the potential use of its uniform in a manner that would not further Departmental goals, the Department will limit the use of the uniform to those who march behind the banners of recognized fraternal organizations. That rule obviates the need for the Commissioner to inquire into the harm that might flow from officers' wearing the Department's uniform for particular unauthorized purposes while off duty. The Department's rule should therefore be upheld as presumptively valid, Kelley v. Johnson, supra, in that it has a logical basis and is not arbitrary or capricious. Having a

rule on use of the uniform is critically necessary to protect an important Departmental interest against erosion.

The Police Department's job is to fight crime and maintain public order. It would be an unforgivable waste of valuable public resources to require the Commissioner to engage in individual inquiry and demonstration of potential harm in each situation where a particular unauthorized officer or group of officers appears or might appear in public in uniform when off duty.

A blanket requirement that the Police Department must demonstrate actual harm from having officers marching in uniform behind banners of organizations not officially authorized to do so also disregards the need for deference to the local authority with expertise in managing its particular police force.

Rules on use of a police uniform must be made for general application in a particular locality. A local police department operates in a specific climate, which differs from place to place. New York City, with a population of over eight million, has a uniformed police force of approximately 40,000 officers. The need for discipline and particularly clear rules concerning the use of uniforms in such a context cannot be denied. That is not to say that what behavior is permissible in uniform may not be an equally sensitive issue in the context of a very small police force. Compare Moore v. City of Wynnewood, 57 F.3d 924 (10th Cir. 1995) (upholding demotion of Deputy Police Chief in six-officer department based on statements he made in uniform to city council that were critical of police chief).

Deference to the Police Department's regulations governing the use of its uniform is, therefore, appropriate, and, to defend its parade policy on uniform wear, the Department should not be required to demonstrate actual harm, or the likelihood of actual harm, from the public use

of its uniform off-duty by a particular unauthorized group or individual.

Application of a Balancing Test Addressing the Department's Need for the Parade Policy Versus Individual Officers' Desire to March in Uniform Requires a Finding That the Balance Tips in Favor of the Police Department.

The balancing test that this Court applied in Pickering and its progeny, Waters v. Churchill, 511 U.S. 661 (1994), and Connick v. Myers, 461 U.S. 138 (1983), amply suffices to address the constitutionality of the Police Department's parade policy. Such cases and a succession of authorities that follow their lead, e.g., Weaver v. United States Information Agency, 87 F.3d 1429 (D.C. Cir. 1996), cert. denied, 520 U.S. 1251 (1997), recognize that if a government agency can reasonably predict potential harm in the absence of its challenged rule or action, the rule or action may be justified under the First Amendment.

The most egregious aspects of the Court of Appeals' decision is its refusal to accept the Police Department's view--the very linchpin of the parade policy and other limitations on use of the Department's uniform and insignia--that a group of officers marching in a parade in uniform necessarily speaks for the Department. The fact that the Court of Appeals discussed this policy last in its opinion well illustrates that the Court literally turned the analysis upside down.

In assessing the validity of the Department's position with regard to uniformed officers' marching in parades, this Court need not address whether there might be some isolated instance where an individual officer might succeed in showing a First Amendment right to be present in uniform in a particular set of circumstances, yet not be viewed as speaking for his or her police department. That case is not before this Court.

What is before this Court is a scenario where a large group of officers--if the entire Latino Officers membership marched, the group would be 1,500 strong--seeks to march behind its organizational banner. Each of those officers would be wearing a uniform with patches on each shoulder of the jacket stating "Police Department City of New York" and a shield on the front stating "City of New York Police." Each officer would wear a cap with a device on the front that resembles the officers' shield. Each officer would, therefore, display at least four different uniform components that indicate an affiliation with the New York City Police Department. Presumably, all other aspects of the uniforms would also conform to Department regulations.

Such group would, realistically, have to be viewed as speaking for the Department. Indeed, if the Department itself did not take that view, the Department would be derelict in its duty to protect the sanctity of its uniform, its primary visual message of authority to enforce the law and assure community safety.

The concept that individual police officers, and particularly a large group of officers, in uniform act only in accordance with authority devolved upon them by the higher authorities running the Police Department, as well as in accordance with law, is a critical component of successful policing. See INS v. Federal Labor Relations Authority, 855 F.2d 1454, 1466 (9th Cir. 1988). It would not be a healthy image for any Police Department if the public perceived, on the contrary, that police officers acted independently according to their individual whims without regard to the approval of their Department, as the Court of Appeals seemed to agree (A20-21). Therefore, most members of the public would assume that a large group of uniformed officers marching together in a parade, whether or not in military formation, were marching at a minimum with the approval of, and more likely on behalf of, the Police Department.

In that officers marching in uniform would generally be viewed as speaking for the Police Department, the interest of the Department in regulating the content of their speech is not only strong, but paramount, an interest that the Court of Appeals unfortunately totally disregarded.

On the other hand, respondents presented no persuasive authority, and the Court of Appeals cited none, supporting the conclusion that they had a First Amendment right to march off duty in their police uniforms behind their banner, absent Department approval.

The cases that the Court of Appeals cites in support of its conclusion in fact support reversal. The Court's reliance on Schact v. United States, 398 U.S. 58 (1970), for the proposition that respondents showed such a right (A21-22), was particularly inapt. Indeed, that case upheld as constitutional so much of a federal criminal statute as prohibited the unauthorized wearing of a federal military uniform. The case struck down as an unconstitutional limitation on artistic expression only that portion of the statute that permitted the use of the uniform in theatrical productions, but limited to those that "did not tend to discredit [the] armed force [in question]."

This case does not deal with a theatrical production, the situation before this Court in Schact. In Schact, the uniform was worn by a person not a member of a military force who was criticizing this country's role in Vietnam. This case deals with the very different scenario of real police officers marching in real parades in New York City. Therefore, Schact is relevant here only as holding that a statute making it a crime to wear a federal military uniform when unauthorized is valid on its face. That holding supports a finding that the challenged parade policy is constitutional, as we argued in the Court of Appeals.

The only other case on which the Court of Appeals directly relied, Moore v. City of Wynnewood, supra, 57

F.3d at 933-34 (A23), also supports reversal. Moore held that the individual officer speaking in uniform in that case, a Deputy Police Chief, had exceeded the bounds of whatever minimal First Amendment right he had. That case certainly is of no assistance in reaching a conclusion that a phalanx of officers belonging to an unrecognized fraternal organization possesses a First Amendment right to parade in New York City Police Department uniforms behind its organizational banner.[4]

To find a First Amendment right that is in fact non-existent, the Court of Appeals was compelled to rely on a flawed analysis that the Police Department had unfairly discriminated by allowing recognized fraternal organizations to march in uniform, but not unrecognized fraternal organizations. To find discrimination, the Court simply concluded--without record support--that recognized and unrecognized organizations were "similarly situated" (A21). The Court thus leapt to the conclusion that the entire recognition process, which was not before the Court, was irrelevant to the issue of authorization to march behind organizational banners. Having no other precedential or policy justification for its decision, however, the Court's reliance on a totally unproven proposition was an apparent necessity.

In any event, even on that unsustainable basis, the most that the Court of Appeals found was that "the interest of [respondents] in wearing uniforms during parades

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[4] The Court of Appeals' quotation of an isolated statement in Zook v. Brown, supra, 748 F.2d 1161, 1167 (A23), is of little assistance given that there was no issue of use of a uniform in that particular case. Moreover, after remand to the District Court and a second appeal, most of the government's positions relating to the officer's unauthorized use of its name in a letter were upheld. See Zook v. Brown, 865 F.2d 887 (7th Cir. 1989).

[behind their own organizational banner] meets minimal standards for triggering First Amendment concerns" (A17). Given the nature of that interest, the strong interest of the Police Department in controlling the use of its uniform and insignia plainly counterbalances it. The Department's needs to foster harmony and limit administrative concerns not specifically related to the central missions of the Police Department (crime prevention and maintenance of order) also lend strong support to the parade policy.

Admitting, arguendo, that Latino Officers members' wearing a uniform while parading behind their banner makes, and is supposed to make, a strong statement, their desire to communicate their views is inconsistent with the Department's right to use its uniform to make its statements, not those of some other entity. Rust v. Sullivan, supra, 500 U.S. 173 194, 196-200. See, also, Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 833-34 (1995) (government may regulate content when it is the speaker or it enlists private entities to convey its own message).

In finding that respondents would be able to send their own special message about the Police Department by marching in uniform behind their own banner, moreover, the Court relied on the fact that Latino Officers had already succeeded in making its name well known in the community "for its position on discrimination and misconduct in the NYPD" (A17). That conclusion itself illustrates that the members of Latino Officers have been freely and commendably permitted to exercise their First Amendment rights as police officers in a vigorous fashion to work to combat the ills they claim to perceive in the Department. They, therefore, have and have utilized many alternative avenues to communicate their views about the Police Department and have no demonstrable need to march in uniform as its apparent spokespersons and representatives.

In sum, the mere fact that Latino Officers' members could send that organization's message by marching in uniform does not support a conclusion that they have a First Amendment right to do so by appropriating the Department's uniform and insignia to further their own organizational goals. They certainly have no such right when they would be perceived to be a representative organization of the Police Department itself, despite their lack of recognition as such.

Allowing any organization to march in uniform behind its banner necessarily communicates the endorsement of the Police Department, just as any athlete would communicate the endorsement of his team if he appeared in team uniform in advertising a product. Given the record before the Court of Appeals, one can only reasonably conclude, therefore, that the message that would actually be communicated by the scenario required by the Court's ruling would be that the Police Department agreed with Latino Officers' accusations about police misconduct and discrimination against Hispanic and Latino officers. This Court has held, however, that no organization can be compelled to sponsor a view with which it does not agree or which it does not wish to express. E.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557 (1995). The Police Department, as a governmental entity that may impose justifiable controls on its employees' speech, is entitled to the same protection against the appearance of sponsorship.

By requiring the Police Department to tolerate the use of its uniform by a group that it has not recognized as representing its goals, the courts below have themselves wrongly endorsed a grave misconstruction of the First Amendment rights of public employees, which this Court never could have intended in NTEU.

CONCLUSION

For the reasons set forth, petitioners respectfully ask this Court to grant their petition for a writ of certiorari.

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December 20, 1999

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Before: Hon. Ralph K. Winter
Chief Judge
Hon. John M. Walker, Jr.
Hon. José A. Cabranes
Circuit Judges

Filed: October 6, 1999

Docket No. 99-7657

LATINO OFFICERS ASSOCIATION, NEW YORK INC.,
-v- THE CITY OF NEW YORK

IT IS HEREBY ORDERED that the judgment of the District Court is unanimously affirmed. An opinion setting forth the reasons for this disposition will follow shortly. The mandate shall issue forthwith.

FOR THE COURT
Karen Greve Milton, Acting Clerk

By:Beth J. Meador
Administrative Attorney

Dated: October 6, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
AUGUST TERM, 1998,

(Argued: July 13, 1999 Decided: November 17, 1999)

LATINO OFFICERS ASSOCIATION, NEW YORK, INC., and ANTHONY MIRANDA, in his capacity as President of the Latino Officers Association, New York, Inc., on behalf of its members.,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, RUDOLPH W. GIULIANI, Mayor of the City of New York, and HOWARD SAFIR, Police Commissioner of the City of New York,

Defendants-Appellants.

Docket No. 99-7657

Before: WINTER, *Chief Judge*, and WALKER and CABRANES, *Circuit Judges*.

Appeal from an order of the United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*), preliminarily enjoining defendants-appellants from prohibiting members of plaintiff-appellee Latino Officers Association from marching, in uniform and behind a Latino Officers Association banner, in various parades. *Latino Officers Ass'n v. City of New York,* No. 97 Civ. 1384 (KMW), 1999 WL 386753 (S.D.N.Y. June 10, 1999). On appeal, defendants challenge the District Court's conclusion that plaintiffs have demonstrated a likelihood of success on the merits of their First Amendment claims.

Affirmed.

CHRISTOPHER T. DUNN, New York Civil Liberties Union, New York, NY (Arthur Eisenberg and Norman Siegel, New York Civil Liberties Union, New York, NY, *of counsel*), *for Plaintiffs-Appellees.*

STUART D. SMITH, Office of the Corporation Counsel of the City of New York (Michael D. Hess, Corporation Counsel of the City of New York; and Barry P. Schwrtz, Assistant Chief, Appeals Division, *of counsel*), *for Defendants-Appellants.* (J. Michael McGuinness, Elizabethtown, NC, *for amicus curiae National Troopers Coalition.)*

JOSE A. CABRANES, *Circuit Judge*:

The City of New York, the New York City Police Department, Mayor Rudolph W. Giuliani, and Police Commissioner Howard Safir (collectively, the "NYPD") appeal from an order of the United States District Court for the Southern District of New York (Kimba M. Wood, *Judge*), entered June 10, 1999, preliminarily enjoining the

NYPD from prohibiting members of plaintiff Latino Officers Association ("LOA") from marching, in uniform and behind an LOA banner, in various parades. See *Latino Officers Ass'n v. City of New York*, No. 97 Civ. 1384 (KMW), 1999 WL 386753 (S.D.N.Y. June 10, 1999) ("LOA"). The District Court found, *inter alia*, that plaintiffs had demonstrated a substantial likelihood of success on the merits of their claim that the NYPD policy at issue violated LOA members' rights under the First Amendment. Several days before the last of the parades in question, in an order entered October 6, 1999, we affirmed the judgment of the District Court, and indicated that we would thereafter file an opinion explaining our reasons for that disposition. We now explain those reasons.

BACKGROUND

The LOA is a fraternal organization that seeks to promote the ideals, goals, and interests of Hispanic officers in the NYPD.[1] The organization was founded in 1996 by a

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[1] It bears noting that "Hispanic" and "Latino" are usually used interchangeably as near synonyms, but the usage preferred by a person or group may reflect nuanced differences of perspective. "Hispanic," derived from the Latin word for Spain, *Hispania*, is defined most simply as "relating to or derived from the people, speech, or culture of Spain ...; *often:* Lation-American. . . –hispanic-american." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1072 (1976). "Latino," meaning simply "Latin American," *id.* at 1276, avoids the explicit link to Spain that inheres in the word "Hispanic."

Placing weight on these subtle differences may be fraught with ironies. An eminent authority, Professor

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dissident faction of the Hispanic Society, another fraternal organization of the NYPD. The LOA is headed by plaintiff Anthony Miranda, and currently has about 1500 members; in contrast, the Hispanic Society had approximately 250 members.

In February 1997, plaintiffs brought this action, under 42 U.S.C. § 1983, challenging the process by which the NYPD officially recognizes groups composed of NYPD members organized on the basis of ethnicity, religion, and sexual orientation. Such official recognition--currently accorded to 25 groups, including the Hispanic Society; see LOA, 1999 WL 386753, at *1 n.2 (listing all 25)--allows an organization to use NYPD facilities for meetings and

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Roberto González Echevarría of Yale University, has observed that "what to call Latin America has been a vehemently debated issue, with some proposing the awkward but perhaps most accurate Iberoamérica for the entire continent, and others Hispanoamérica." Roberto González Echevarria, Preface to THE OXFORD BOOK OF LATIN AMERICAN SHORT STORIES xi, xi (Roberto González Echevarría ed., 1997). He adds: "[I]t was the French, *in their imperialist zeal [in Mexico, under the Emperor Maximilian, in particular*] who coined the term [Latin America]. They opposed Latin to Anglo America to claim for political gain a historical and linguistic kinship with regions recently freed from Spanish domination. The name has stuck, although clearly many of the cultures in the region had no significant connection with the Roman Empire." Id. (emphasis added).

fundraising, to post notices on NYPD bulletin boards, to list events in the official NYPD calendar of events, and to recruit members at the Police Academy. In addition, only a recognized organization may seek permission on behalf of its members to march in a parade in uniform and behind the organization's banner. If a recognized organization is marching in a parade, any officer may march in uniform behind that organization's banner. In contrast, if an officer chooses to march behind the banner of an unrecognized group, he may not wear his NYPD uniform.

The process by which groups apply for recognition by the NYPD is now set forth in NYPD Personnel Bureau Memo 30 ("PBM 30"), which was promulgated in May 1998. According to PBM 30, "official recognition of an organization is at the sole discretion of the police commissioner." To be recognized, however, the objectives of a prospective organization "must be consistent with the goals and mission of the [NYPD] ... [and] consistent with the law." Further, PBM 30 notes that, "[i]n order to promote harmony within the Department, discourage rivalries between groups of officers and conserve the resources of the Department, hierarchy in meeting with and supervising the activities of recognized organizations, the Department discourages the formation of multiple organizations which purport to serve the same goals and missions."

The LOA applied for recognition from the NYPD pursuant to PBM 30 in May 1998 and, when no response was forthcoming, again in January 1999.[2] On May 5, 1999,

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[2] The LOA had applied previously for recognition by the NYPD in 1997 (before the promulgation of PBM 30), without success. That application was allegedly rejected pursuant to an NYPD policy in effect at the time, which

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defendant Safir denied the LOA's application, asserting that the LOA's purposes and objectives mirrored those of the Hispanic Society, which was already recognized by the NYPD. The LOA questions whether this justification was offered in good faith, contending that the NYPD favors the Hispanic Society because it has political ties to the Mayor and because it has not been as active as the LOA in challenging NYPD discrimination against minorities.

Following the NYPD's rejection of the LOA's application for recognition, plaintiffs moved for a preliminary injunction with respect to only the parade provisions of the NYPD recognized group policy. Specifically, plaintiffs sought an order prohibiting the NYPD from preventing members of the LOA from marching in uniform and behind the LOA banner in five parades from June 1999 to October 1999.[3] The District Court granted the motion, finding that plaintiffs had a First Amendment interest in wearing NYPD uniforms in public parades and that the NYPD had failed to demonstrate that plaintiffs' interest was "outweighed by [the] expression's

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prohibited recognition of more than one group per ethnic, religious, or sexual orientation group.

[3] The specific parades are: the Puerto Rican Day Parade, held on June 13, 1999; the Dominican Day Parade, held on August 8, 1999; the Brooklyn Puerto Rican Day Parade, held on August 15, 1999; the Desfile de Hispanidad de Queens, held on September 12, 1999; and the Desfile de Hispanidad, Fifth Avenue, held on October 10, 1999.

necessary impact on the actual operation of the Government." *LOA*, 1999 WL 386753, at *4 (internal quotation marks omitted).[4] This appeal followed.[5] Like the preliminary injunction, this appeal concerns only the parade provisions of the NYPD recognized group policy.

DISCUSSION

We review a decision to grant a preliminary injunction for abuse of discretion. See *SEC v. Cavanagh*,

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[4] This is not the first time plaintiffs have obtained a preliminary injunction allowing them to march in uniform and behind the LOA banner. In 1997, plaintiffs sought such a preliminary injunction with respect to the Puerto Rican Day Parade held on June 8, 1997. In an opinion dated June 6, 1997, Judge Mirian Goldman Cedarbaum granted plaintiffs' motion. See *Latino Officers Ass'n v. City of New York*, 966 F. Supp. 238 (S.D.N.Y. 1997). Two months later, in August 1997, plaintiffs moved for a similar preliminary injunction with respect to four other parades. In an opinion dated August 19, 1997, Judge Wood granted that motion. See *Latino Officers Ass'n v. City of New York*, No. 97 Civ. 1384(KMW), 1997 WL 473972 (S.D.N.Y. Aug. 19, 1997). Defendants appealed Judge Wood's decision, and, after plaintiffs' then counsel failed to appear, we stayed the preliminary injunction and eventually dismissed the appeal as moot. See *Latino Officers Ass'n v. City of New York*, No. 97-9013, 1998 WL 386178 (2d Cir. Apr. 22, 1998) (unpublished order).

[5] On June 10, 1999, defendants applied to us for a stay of the injunction pending appeal. By order entered June 11, 1999, we denied defendants' application for a stay, but agreed to expedite the appeal.

155 F.3d 129, 132 (2d Cir. 1998). A preliminary injunction will be overturned if the district court "applie[d] legal standards incorrectly or relie[d] upon clearly erroneous findings of fact." Id. (internal quotation marks omitted).

Where, as here, a moving party seeks a preliminary injunction to stay "'government action taken in the public interest pursuant to a statutory or regulatory scheme,'" that party must show irreparable harm in the absence of an injunction and a likelihood of success on the merits. *New York Magazine v. Metropolitan Transp. Auth.* 136 F.3d 123, 127 (2d Cir.) (quoting *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996)), *cert. denied*, 119 S. Ct. 68 (1998); accord *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) (per curiam). Violations of First Amendment rights "are commonly considered irreparable injuries for the purposes of a preliminary injunction." *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997); *see also Deeper Life Christian Fellowship, Inc. v. Board of Educ.*, 852 F.2d 676, 679 (2d Cir. 1988) ("'[The] loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). Accordingly, in the context of this case, whether plaintiffs have satisfied the requirements for a preliminary injunction turns on whether they have shown a likelihood of success on the merits of their claim that the NYPD parade policy violates their rights under the First Amendment. See *Beal v. Stern*, 184 F.3d 117, 123-24 (2d Cir. 1999).

I. Restrictions on Government Employee Speech

It is well established that "[i]ndividuals do not relinquish their First Amendment rights by accepting employment with the government." *Harman v. City of New York*, 140 F.3d 111, 117 (2d Cir. 1998) (citing *Pickering v.*

Board of Educ., 391 U.S. 563, 568 (1968)). Nevertheless, the state does have "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering*, 391 U.S. at 568. Accordingly, the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *United States v. National Treasury Employees Union,* 513 U.S. 454, 465 (1995) (*"NTEU"*). In evaluating a restriction on government employees' speech, a court must seek "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

The District Court, relying on the Supreme Court's decision in *NTEU*, subjected defendants to a higher burden of justification than normally required of the government when the free speech interests of its employees are at stake, on the ground that the NYPD parade policy restrains speech "before it occurs." LOA, 1999 WL 386753, at *4. In *NTEU,* which involved a statute that prohibited federal employees from "receiv[ing] any honorari[a]," 513 U.S. at 459, the Supreme Court drew a distinction between *ex post* punishment, based on an "analysis of one employee's speech and its impact on that employee's public responsibilities," and *ex ante* rules, which can represent a "wholesale deterrent to a broad category of expression by a massive number of potential speakers." 513 U.S. at 466-67; *see also id.* at 481 (O'Connor, J., concurring in the judgment in part and dissenting in part). Emphasizing that *ex ante* restrictions on expression "give[] rise to far more serious concerns than could any single supervisory decision," the Court held that the government's burden of

justification is "greater" with respect to such *ex ante* restrictions. Id. at 468 (majority opinion). Specifically, "[t]he government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* (quoting *Pickering*, 391 U.S. at 571). Further, the government "must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475 (internal quotation marks omitted).

Defendants' principal contention on appeal is that the District Court erred in applying this stricter standard from *NTEU*. The *NTEU* standard does not apply, defendants argue, because (1) the NYPD parade policy affects fewer employees (approximately 40,000 as opposed to 1.7 million) and restricts less expression (the unauthorized wearing of uniforms in parades as opposed to receiving compensation for writings or speeches on any subject) than the statute at issue in *NTEU*; (2) the parade policy, unlike the statute in *NTEU*, does not "'single out' expressive conduct"; and (3) the parade policy is not a "classic 'prior restraint,'" but rather "suppresses precisely that conduct which [the NYPD] would be allowed to punish after the fact."[6] These arguments are without merit.

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[6] Defendants argue that the degree of deference owed to the NYPD parade policy is governed, not by *NTEU*, but by *Fighting Finest, Inc. v. Bratton*, 95 F.3d 224 (2d Cir. 1996). In *Fighting Finest*, we applied public forum analysis to reject a claim that the First Amendment required the NYPD

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First, that the NYPD parade policy affects fewer employees than the policy at issue in *NTEU* and that it arguably could be characterized as narrower in scope are irrelevant to whether the *NTEU* standard applies.[7] Application of the *NTEU* standard turns on whether a government employee's expression is restricted "through a generally applicable statute or regulation, as opposed to a particularized disciplinary action," and there is no doubt that the former is involved here. *Weaver v. United States Info. Agency*, 87 F.3d 1429, 1439 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997). To be sure, the *NTEU* Court cited the "*vast group* of present and future employees" and the "*broad range* of present and future expression" at stake

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to allow a non-profit boxing team of NYPD members to post notices on police department bulletin boards. See id. at 229-31. Although police department bulletin boards may be compared to the kinds of governmental property commonly subjected to public forum analysis, we do not think that police uniforms are similarly comparable. Accordingly, we decline to apply public forum analysis to plaintiffs' claims.

[7] We do not mean to suggest agreement with defendants' assertion that the restriction at issue here is narrower in scope than the restriction at issue in *NTEU*. In fact, one could argue just the opposite insofar as the NYPD parade policy prohibits certain expression altogether while the statute in *NTEU merely imposed a "burden" – albeit a "significant" one – on expressive activity. NTEU*, 513 U.S. at 468.

in that case as factors weighing against the government. 513 U.S. at 468 (emphases added). But nothing in *NTEU* implies that the stricter standard applies *only* when a "vast group" of employees is involved or when a regulation restricts a "broad range" of expression. *Cf. Latino Officers Ass'n v. Safir*, 170 F.3d 167, 171-72 (2d Cir. 1999) (applying *NTEU* in upholding an NYPD regulation restricting officers' public comments regarding police department matters); *Harman*, 140 F.3d at 118 (applying *NTEU* in striking down a regulation restricting the speech of 6500 employees in the Administration for Children's Services).[8]

Defendants' second argument – that the parade policy, in contrast to the statute at issue in *NTEU*, does not "'single out' expressive conduct"—is similarly inapposite. *NTEU* concerned a law that banned federal employees from accepting compensation for making speeches or writing articles in their spare time. The two government commissions that recommended the ban, however, had

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[8] In *Latino Officers Ass'n v. Safir*, we phrased the standard somewhat differently from the way we phrase it here and the way we phrased it in *Harman*. See *Latino Officers Ass'n v. Safir*, 170 F.3d at 171-72 ("'Where a restraint is accomplished through a generally applicable statute or regulation ..., we must ... make sure that the regulation's sweep is "reasonably necessary to protect the efficiency of the public service."'" (quoting *Weaver*, 87 F.3d at 1439 (quoting *NTEU*, 513 U.S. at 474))). Nevertheless, it is evident from our references in *Latino Officers Ass'n v. Safir* – to *NTEU* and to *Harman*, *Weaver*, and *Sanjour v. EPA*, 56 F.3d 85, 93-94 (D.C. Cir. 1995), all of which applied *NTEU* – that the standard we applied in that case came from *NTEU*. See *id.*

stressed the importance of prohibiting both compensation for "appearance[s], speech[es] or article[s] *and* compensation for "other off duty activities" such as consulting, serving on corporate boards, and even sports. 513 U.S. at 474-75. Under these circumstances, the Supreme Court found the statute's singling out of expressive activity significant, concluding that it "undermine[d] the Government's submission that the breadth [of the statute was] reasonably necessary" to protect the government's interest in the efficiency of public service. *Id.* at 474. That the statute in *NTEU* restricted only expressive activities was thus a *factor* the Court used in assessing the reasonableness of the restriction at issue there; it was not, as defendants appear to assert, a *prerequisite* to the Court's stricter scrutiny

Finally, defendants contend that, in contrast to the statute in *NTEU*, the NYPD parade policy is not a "classic 'prior restraint'" because it "supresses precisely that conduct which [the NYPD] would be allowed to punish after the fact." But this argument presumes the very conclusion that is at issue in this case--namely, that the NYPD can prohibit unrecognized groups, including the LOA, from marching in parades in uniform and behind their organization banners. The danger of a prior restraint, as opposed to *ex post* disciplinary action, is precisely that making predictions *ex ante* as to what restrictions on speech will ultimately be found permissible is hazardous and may chill protected speech. *See, e.g., NTEU*, 513 U.S. at 481 (O'Connor, J., concurring in the judgment in part and dissenting in part) *("[E]x ante* rules, in contrast to *ex post* punishments, carry risks of overinclusiveness and underinclusiveness."); *id.* at 468 (majority opinion) ("[U]nlike an adverse action taken in response to actual speech, [an *ex ante* restriction] chills potential speech before it happens."); *see also New York Magazine*, 136 F.3d at 131 ("We consider prior restraints to be particularly

abhorrent to the First Amendment in part because because they vest in government agencies the power to determine important constitutional questions properly vested in the judiciary.").

In short, the District Court properly subjected defendants to the "greater" burden of justification set forth in *NTEU*.

II. Applying the *NTEU* Standard

Having decided that the stricter *NTEU* standard applies to the NYPD parade policy, we must evaluate the District Court's conclusion that plaintiffs were likely to succeed on the merits of their First Amendment claims. Under *NTEU*, that evaluation involves a consideration of the parties' respective interests.

The District Court found that plaintiffs have a strong First Amendment interest in marching in uniform and behind their own banner. Noting "[n]umerous newspaper articles ... attest[ing] to the prominent role played by the LOA in speaking publicly about alleged discrimination in the police force," the Court concluded that "[t]he message that plaintiffs seek to convey is not merely that they are proud to be Latino and police officers ..., but that they are willing to criticize the NYPD publicly for alleged discrimination." LOA, 1999 WL 386753, at *4 & n.4.

On appeal, defendants challenge these findings with three arguments. First, they contend that plaintiffs' interest in wearing police uniforms is not protected under the First Amendment at all because members of the public are unlikely to understand "that the LOA [is] concerned about discrimination and police misconduct merely from the fact that the LOA members [are] wearing uniforms." Second,

defendants argue that police officers' ethnic pride is not a matter of public concern, as required for protection of government employee speech under *Pickering* and *NTEU*. Finally, defendants assert that plaintiffs' interest in wearing police uniforms while marching is weak because they could just as easily communicate their intended messages without uniforms--for example, by handing out pamphlets or by carrying a banner that reads "LOA--Police Officers Concerned About Discrimination and Police Misconduct."

In light of our view, discussed below, that defendants have an improperly selective policy concerning organizations that are permitted to wear uniforms during parades, we need determine only that the interests of plaintiffs in wearing the uniform meet minimal standards for triggering First Amendment concerns. Notwithstanding defendants' arguments to the contrary, we find that they do.

First, members of the public--specifically, the spectators at each of the parades--are more likely to discern and understand the LOA's message about discrimination and misconduct in the NYPD if plaintiffs wear uniforms. To be sure, as defendants contend, spectators are unlikely to understand the LOA's message *merely* from the fact that its members are in uniform. However, in conducting the necessary inquiry into "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," *Texas v. Johnson*, 491 U.S. 397, 404-05 (1989), a court should not disregard "the context in which [that conduct] occurred." *Id.* at 405. Here, the context of plaintiffs' conduct includes the significant publicity that the LOA has received for its position on discrimination and misconduct in the NYPD. In view of that context, we think it is fair to infer that "the likelihood was great that [plaintiffs'] message would be understood by those who viewed it." *Id.* at 404 (internal quotation marks omitted); *see also Harley v. Irish-*

American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection.").

Second, plaintiffs' interest in communicating ethnic pride as members of the NYPD is not necessarily a matter only of private concern. A statement is of public concern if, in light of "the content, form, and context of [that] statement, as revealed by the whole record," *id.* at 147-48, it can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983); *see Lewis v. Cowen*, 165 F.3d 154, 163-64 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 70 (1999). The parades in which plaintiffs seek to march, each of which garners hundreds of thousands of spectators--both in person and on television--are *themselves* about ethnic pride and celebrating ethnic participation in the civic life of New York City. As the current President of the Puerto Rican Day Parade stated before the thirty-fourth annual parade in 1991, "the philosophy of and reason for the [Puerto Rican Day Parade] 'has been to succeed in making sure that *every* Puerto Rican feels proud of his culture.'" *Marilyn Pérez-Cotto, Roots of the Parade*, N.Y. NEWSDAY, June 9, 1991 (Community Affairs Special Section), at 2 (emphasis added); *see also* 144 CONG. REG. E1137, E1137 (June 16, 1998) (statement of Rep. Serrano) (referring to the Puerto Rican Day Parade as a "national event, in which thousands of individuals march along Fifth Avenue, in Manhattan, in celebration of our Puerto Rican heritage and our achievements in this nation."). Indeed, that the NYPD authorizes other groups such as the Hispanic Society to march in uniform is an acknowledgment that celebrating ethnic participation in the police force can be "fairly considered ... of ... concern to the community." *Id.* at 146.

Finally, defendants' own policies make it difficult for us to accept that plaintiffs could communicate the same message--or that they could communicate their message as effectively--without wearing their police uniforms. As defendants acknowledge by allowing other groups, including the Hispanic Society, to march in uniform, wearing the official uniform of the NYPD in a public parade like the Puerto Rican Day Parade has a unique expressive quality that would be lost were plaintiffs merely to hand out fliers or to carry a banner proclaiming their message explicitly.

Under *NTEU*, we must affirm the judgment of the District Court unless defendants demonstrate that plaintiffs' interests and the interests of plaintiffs' potential audiences, *see NTEU, 513 U.S. at 468; Sanjour*, 56 F.3d at 94, are outweighed by the expression's "necessary impact on the actual operation of the Government." *NTEU,* 513 U.S. at 468 (internal quotation marks omitted). Before the District Court, defendants identified "two principal interests" served by the NYPD policy prohibiting an unrecognized group whose mission mirrors that of a recognized group from marching in uniform: first, the need of the NYPD to promote the appearance and reality of harmony within its ranks; and, second, the conservation of resources of the NYPD Ceremonial Unit, which reviews and musters marching officers to ensure that they are properly attired and appropriately behaved. *LOA*, 1999 WL 386753, at *5. The District Court concluded that these interests were insufficient, however, in large part because, in its view, defendants failed to demonstrate that such interests would actually be undermined by allowing plaintiffs to march. See *id.* at *5-6.

Appropriately in our view, defendants do not seriously contest these conclusions on appeal.[9] Instead, defendants press two arguments allegedly not considered by the District Court: (1) that the NYPD has an absolute right to control the way its uniform and symbols are deployed; and (2) that spectators are likely to think that any group marching in uniform is speaking for the NYPD and that the NYPD has a right to control the content of its own expression.[10] In our view, neither argument satisfies defendants' burden of justification.

It is undisputedly true that the NYPD has a strong interest in maintaining control over how its uniform and symbols are used. Requiring NYPD officers to wear their uniforms while on duty makes them "more readily recognizable to the public, encourages *esprit de corps*, and subordinates personal preferences in favor of the overall group mission," all of which furthers the police department's mandate to promote public safety. *INS v. Federal Labor Relations Auth.*, 855 F.2d 1454, 1466 (9th Cir. 1988); *cf. Kelley v. Johnson*, 425 U.S. 238, 246 (1976) (holding that deference is owed to police department grooming regulations under the Fourteenth Amendment Due Process Clause based on such organizations' "overall

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[9] Nor do they assert that duplicativeness among groups in itself would have a necessary impact on the actual operation of the NYPD.

[10] The parties dispute whether defendants raised these arguments before the District Court and, if they did, whether they are now relying on evidence that was not presented to the District Court. Because we do not think that defendants' arguments warrant reversal in any event, we need not settle these disputes.

need for discipline, esprit de corps, and uniformity"). Correspondingly, prohibiting the unauthorized wearing of a police uniform prevents improper exercise of the powers granted to police officers and exploitation of the trust that wearing a police uniform is meant to inspire.

Nevertheless, defendants' interest in controlling the use of the NYPD uniform does not support the specific restriction at issue here--namely, the prohibition on plaintiffs' marching in uniform behind their organizational banner in an ethnic pride parade when similarly situated organizations are allowed to march in such a manner. Whether or not defendants could constitutionally prohibit all fraternal organization from marching in uniform--an issue we need not, and do not, decide--the fact of the matter is that the NYPD already permits at least 25 such organizations to march in uniform. Having allowed these organizations to use the NYPD uniform in such a manner over many decades, the NYPD cannot now deny plaintiffs the same privilege without demonstrating that their use of the uniform is both distinguishable from that of the various authorized organizations and "so threatening to the efficiency of the [NYPD] as to render the [restriction] a reasonable response to the threat." *NTEU*, 513 U.S. at 473.

Although not directly on point, *Schacht v. United States*, 398 U.S. 58 (1970), a case drawn to our attention by defendants, supports this conclusion. In *Schacht*, the Supreme Court reversed a conviction under 18 U.S.C. § 702, which makes it a crime for any person without authority to wear a uniform of the United States armed forces, when a separate provision permitted one to wear a military uniform "'in a theatrical or motion-picture production ... *if the portrayal does not tend to discredit[the] armed force[s].*'" *Id. at* 59-60 (quoting 10 U.S.C. § 772(f) (emphasis in *Schacht*). Although the Court acknowledged that § 702, "standing alone," was a "valid

statute on its face," *id.* at 61, it held that the exception for any portrayal that "does not tend to discredit [the] armed force[s]" impermissibly restricted expression on the basis of viewpoint. See *id.* at 62-63.

Here, as in *Schacht*, defendants may be constitutionally permitted to prohibit all fraternal organizations from marching in uniform.[11] But it does not follow from this premise that defendants have the seemingly lesser included authority to ban only some organizations from marching in uniform. Under *Schacht*, and under other Supreme Court cases involving selective prohibitions one expression, defendants' selectivity must itself pass constitutional muster. *Cf. City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425-28 (1993) (holding that Cincinnati could not ban commercial newsracks from public property while allowing noncommercial newsracks, "even if ... the city might entirely prohibit the use of newsracks on public property"); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (invalidating a statute that prohibited residential picketing, except for labor picketing, in part because there is "nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern"); *Police Dep't v. Mosley*, 408 U.S. 92, 94 (1972) (invalidating a city ordinance prohibiting picketing in front of schools, except for labor picketing, on the ground that it "makes an impermissible distinction between labor picketing and other peaceful picketing"). Defendants' general interest in controlling the use of its uniforms and other symbols does not, by itself, suffice.

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[11] Again, we need not, and do not, decide this issue.

Nor are we persuaded by defendants' second argument--that the public is likely to believe that the NYPD itself is speaking and that the NYPD has a right to control its own speech. To be sure, it is well settled that the government may regulate its own expression in ways that would be unconstitutional were a private party the speaker. *See, e.g., Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) ("[W]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."). But, as the *Pickering* and *NTEU* line of cases makes plain, not all speech by a government agent is "government speech" subject to such lenient analysis; indeed, even when a government agent represents that he is speaking as a representative of the government body, that agent may have independent rights under the First Amendment. *See, e.g., Moore v. City of Wynnewood*, 57 F.3d 924, 933-34 (10th Cir. 1995); *cf. Zook v. Brown*, 748 F.2d 1161, 1167 (7th Cir. 1984) ("[T]he [Police] Department cannot maintain that it has an overriding interest in every conceivable public statement [an officer] might make, no matter what the context or content of the statement, simply because the [officer] identifies his office.")

In the present case, we decline to adopt defendants' invitation to characterize plaintiffs' expression as government speech subject to any and all regulation. Defendants raise the slippery-slope argument that if they are compelled by the First Amendment to permit the LAO to march, then they would *a fortiori* be compelled to "allow police officers to march in uniform with any organization whatsoever, including the Ku Klux Klan or the Nazi Party." But whether or not defendants could, consistent with the First Amendment, prohibit police officers from marching in uniform with a group like the Ku Klux Klan--an issue we need not, and do not, decide today--the mere possibility

that such a situation might arise does not justify prohibiting plaintiffs themselves from marching in uniform behind the LOA banner in the parades at issue here.

In short, defendants have failed to satisfy their burden of showing that plaintiffs' expression *specifically* would have an impact on the actual operation of government. In fact, by their own conduct, defendants have proved the exact opposite, for, throughout most of this dispute, defendants have justified their prohibition of the LOA marching in uniform on the sole ground that its message is duplicative of the Hispanic Society's message. The NYPD, having allowed the Hispanic Society to march in uniform and behind its banner, cannot now contend that allowing the LOA to do the same would have a detrimental effect on its actual operations.

CONCLUSION

For the reasons stated above, we agree with the District Court that plaintiffs have demonstrated a likelihood of success on the merits of their claims that the NYPD parade policy violates their rights under the First Amendment.[12] Accordingly, the judgment of the District Court is affirmed.

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[12] In light of this conclusion, we need not address plaintiffs' alternative argument that the NYPD parade policy constitutes an impermissible licensing scheme under *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), or amicus curiae's argument that the policy violates the constitutional guarantee of equal protection of the laws and substantive due process.

1999 U. S. Dist. LEXIS 8782

LATINO OFFICERS ASSOCIATION, NEW YORK, INC., and ANTHONY MIRANDA in his capacity as President of the Latino Officers Association, New York, Inc., on behalf of its members, Plaintiffs, - against- THE CITY OF NEW YORK, THE POLICE DEPARTMENT OF THE CITY OF NEW YORK, RUDOLPH GIULIANI, Mayor of the City of New York, HOWARD SAFIR, Police Commissioner of the City of New York, Defendants.

97 Civ. 1384 (KMW)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

COUNSEL: For LATINO OFFICERS ASSOCIATION, NEW YORK, INC., ANTHONY MIRANDA, plaintiffs: Jonathan Neil Fuchs, Jonathan N. Fuchs, Esq., New York, NY.

For LATINO OFFICERS ASSOCIATION, NEW YORK, INC., ANTHONY MIRANDA, plaintiffs: Christopher T. Dunn, New York Civil Liberties Union Foundation, New York, NY.

For CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, RUDOLPH W. GIULIANI, HOWARD NEW YORK CITY POLICE COMMISSIONER, defendants: Kerri L. Jew, Corporation Counsel of the City of New York, New York, NY.

WOOD, U.S.D.J.:

Plaintiffs have moved for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65 enjoining defendants from prohibiting the plaintiffs from participating, in their uniforms and behind their organizational banner, in various parades throughout the course of this summer and the early fall. For the reasons stated below plaintiffs' motion is granted.

1. Background

This is the third time that plaintiffs have sought a preliminary injunction allowing them to march in uniform and behind their organizational banner.

A. History of this Case

The parties first appeared before Judge Cedarbaum, who granted plaintiffs' motion for a preliminary injunction on June 6, 1997, permitting them to march in a parade the following weekend in uniform and behind their organizational banner. See *Latino Officers Ass'n v. City of New York, 966 F. Supp. 238 (S.D.N.Y. 1997).* At a hearing on August 8, 1997, this Court granted plaintiff's motion for preliminary injunction enjoining defendants from prohibiting plaintiffs from marching in several parades in the late summer and fall of 1997. (See *Latino Officers Ass'n v. City of New York, 1997 U.S. Dist. LEXIS 12353, 97 Civ. 1384 (KMW), 1997 WL 473972 (S.D.N.Y. Aug. 19, 1997)* (the "1997 Order").) Defendants promptly appealed the Court's order to the Second Circuit. The Second Circuit stayed the injunction in an order dated October 6, 1997, not on the merits of the case, but because plaintiff's former counsel failed to file any papers on appeal. Defendants subsequently moved to dismiss the complaint, and the Court denied the motion in an Opinion and Order

dated February 20, 1998. (*See Latino Officers Ass'n v. City of New York, 1998 U.S. Dist. LEXIS 2018, 97 Civ. 1384 (KMW), 1998 WL 80150 (S.D.N.Y. Feb. 25, 1998) (the "1998 Order).)*

Most of the basic issues in the case remain the same. Plaintiff Latino Officers Association ("LOA") is a fraternal organization, founded in 1996, representing over one thousand New York City Police Officers of Hispanic descent. (See Complaint ¶ 4.) Plaintiff Anthony Miranda ("Miranda") is the duly elected President of the LOA. (Id. ¶ 5.) Defendant New York City Police Department ("NYPD") from time to time issues a list of the organizations of NYPD members that it recognizes. (Id. ¶ 11.) There are significant benefits to being recognized, most of which the Court discussed in its 1998 Order.[1] On this motion, the relevant benefit of recognition is the only recognized organizations may march in public parades in NYPD uniform behind their organizational banners. (See Stipulations, May 27, 1999 ("Stip."), ¶ 11.) Organizations recognized by the NYPD routinely march in uniform in public parades behind their organizational banners. (See Stip. ¶ 12.) The NYPD currently recognizes twenty-five organizations.[2]

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[1] The Court noted that only recognized organizations may use the NYPD facilities for organizational meetings and fund raising, post notices on precinct bulletin boards, have their events listed in the NYPD official calendar of events or other official publications, and engage in recruitment at the Police Academy. (See 1998 Order, at *1.)

[2] These organizations are the American Legion, the Anchor Club (Knights of Columbus), the Asian Jade Society, the Columbia Association, the Emerald Society, the Gay

(continued)

The LOA has repeatedly sought recognition by the NYPD. (See Complaint ¶ 14.) For many years, the NYPD has recognized the Hispanic Society Police Department of the City of New York (the "Hispanic Society"), which was founded in 1957, and which has fewer members than the LOA. (See id. ¶¶ 23-24, 47.)

In 1997, the NYPD rejected the LOA's requests for recognition because the NYPD had already recognized the Hispanic Society, which claims to promote the interests, ideals, goals, and camaraderie of the Latino community within the NYPD (see id. ¶ 16); the NYPD had a policy of recognizing only one organization for each religious, fraternal, and ethnic group, so as to avoid rivalries between groups (see Id. ¶ 20), and to limit the time the NYPD hierarchy needs to spend meeting with organizations. The Court has previously noted that the LOA questions whether

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Officers' Action League, the Guardians Association, the Hispanic Society, the Holy Name Society (Manhattan-Bronx-Staten Island), the Holy Name Society (Brooklyn-Queens), the Honor Legion, the International Police Association, the Police Officers for Christ, the Police Self Support Group, the Police Square Club, the Policewomen's Endowment Association, the Pulakski Association, the Regina Coeli Society, the Saint George Association, the Saint Paul's Society, the Shomrim Society, the Steuben Association, the Traffic Squad Benevolent Association, the Viking Association, and the Committee of Police Societies.

(See Stip. ¶ 1.)

these justifications are offered in good faith, and contends that "the NYPD's refusal to officially recognize the LOA is motivated by the NYPD leadership's alleged preference for the Hispanic Society, an organization that the LOA contends has political ties to the Mayor . . . ." (1997 Order, at *1.)

B. Recent Developments

Since the parties were last before this Court, there have been two significant developments. First, on May 13, 1998, the NYPD promulgated a new policy setting forth the process by which groups apply for recognition, NYPD Personnel Bureau Memo 30 ("PBM 30"). (See Stip. ¶ 6.) PBM 30 sets forth the only current written guidelines relating to NYPD recognition of religious, fraternal, and ethnic organizations. (See Stip. ¶ 17.) According to PBM 30, "official recognition of an organization is at the sole discretion of the police commissioner." (See Stip. Exh. B ("PBM 30") at 1.) The only criterion or guideline set forth in PBM 30 is that, "In order to promote harmony within the Department, discourage rivalries between groups of officers and conserve the resources of the Department hierarchy in meeting with and supervising the activities of recognized organizations, the Department discourages the formation of multiple organizations which purport to serve the same goals and missions." (Id.) According to defendants, this new policy is a departure from the policy that was in place the last time the parties were before the Court, when the NYPD had a rule limiting recognition to no more than one organization per religious, fraternal, and ethnic group. (See 1998 Order at *2.)[3] In his deposition,

[3] Counsel for defendants initially stated that defendants had a policy of limiting official recognition to one organization for each religious, fraternal, or ethnic group. (See Def. (continued)

Police Commissioner and defendant Howard Safir elaborated on the new policy as follows:

Q: What's your understanding as to whether or not the department has a rule that there can only be one recognized group per ethnicity?

A. I don't think there's such a rule. I that that generally we look to see whether or not a new group that's applying would basically do the same thing that an existing group does, of if the members of the group that's applying could participate in an existing group. And that's generally the criteria that I use.

Q: I want to make sure I understand what the policy is about this. The department does or does not have a policy that there can be only one recognized group per ethnicity?

A: I think generally we look to see – excuse me one second.

(Recess taken.)

(continued)

Mem. at 3 (dated May 10, 1999).) At a conference on May 21, 1999, it became evident that this was not in fact the policy, and that the NYPD policy now is that there can be more than one organization for, e.g., one ethnic group, so long as each organization serves a different purpose. (See Transcript of Proceedings Before Hon. Kimba M. Wood, May 21, 1999, at 9.) Counsel for defendants subsequently filed a new set of papers, dated May 27, 1999.

A: Generally, we would have one group per ethnicity. Generally.

Q: Does that mean that there's a policy that the department would not recognize more than one group per ethnicity?

A: The policy is if the group is determined to be duplicative, then we would not recognize it.

(Deposition of Howard Safir, May 19, 1999. Tr. at 21-22.)

The second significant development since the parties were last before the Court is that the NYPD again rejected LOA's application for recognition. The LOA filed its application for recognition, with all required documentation, as of January 25, 1999. (See Pl. Mem. at 3.) After receiving no action on the application, plaintiffs informed the Court on May 5, 1999, that they would move by Order to Show Cause to obtain a preliminary injunction enjoining defendants from preventing them from marching in certain upcoming parades in uniform behind their organizational banner. (See Letter of Christopher Dunn to Hon. Kimba M. Wood, May 5, 1999.) In the course of the deposition of defendant and Police Commissioner Howard Safir on May 19, 1999, however, it emerged that defendant Safir had denied LOA's application for recognition on May 5, 1999. (See Transcript, at 5.) The NYPD asserts that the decision to deny the LOA's application was based on defendants' belief that the LOA's goals and objectives mirrored those of the Hispanic Society. (See Memo of Deputy Inspector Michael O'Neill) ("O'Neill Memo"), attached to the Declaration of Georgia Pestana, May 27, 1999, at Exh. H.)

Plaintiffs again seek an injunction allowing them to march in uniform behind their organizational banner in several parades this summer and early fall. Plaintiffs

challenge the NYPD's recognition policy both on its face and as applied to them, which policy, inter alia, allows only recognized groups to march in uniform in parades behind their organizational banners. The Court will refer to this latter policy as the "parade policy," because the Court's ruling addresses only plaintiffs' request that they be permitted to march in uniform behind their LOA banner in certain parades; the Court expresses no view at this point in the litigation as to any other aspect of the NYPD's policy regarding police uniforms, or the NYPD policy regarding recognizing organizations.

II. Discussion

In the Second Circuit, the criteria a party must satisfy to obtain a preliminary injunction are well established. A party seeking a preliminary injunction must show: (1) that he or she will risk irreparable harm if the injunction is denied; and (2) either likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief. See *Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839, 853 (2d Cir. 1996); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).* In a case involving an injunction against government action taken in the public interest under a statutory or regulatory scheme, the movant must satisfy the stricter of these standards, likelihood of success on the merits. See *New York Magazine v. Metropolitan Transp. Auth., 136 F.3d 123, 127 (2d Cir.), cert. denied, 142 L. Ed. 2d 53, 119 S. Ct. 68 (1998); Able v. United States. 44 F.3d 128, 131 (2d Cir. 1995)* (per curiam).

B. Irreparable Harm

There is no dispute that a denial of First Amendment rights constitutes irreparable harm. See *Elrod v. Burns*, 427 U.S. 347, 373-74, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir. 1991). Defendants contend that plaintiffs have failed to show how their First Amendment rights would be violated by enforcement of the NYPD's parade policy. (See Def. Mem. at 11.)

C. Likelihood of Success on the Merits

1. The Legal Framework

The Supreme Court has explained that the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large. *United States v. National Treasury Employees Union, 513 U.S. 454, 465 130 L. Ed. 2d 964, 115 S. Ct. 1003 (1995) ("NTEU")*; *Waters v. Churchill, 511 U.S. 661, 671, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994); Connick v. Myers, 461 U.S. 138, 142, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983)*. In determining whether the restraint violates the First Amendment, the Court must balance an employee's right to comment on matters of public concern with the government's interest, as an employer, in providing public services efficiently and effectively. See *Pickering v. Board of Education, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)*; *Latino Officers Ass'n, et al. v. Safir, et al., 170 F.3d 167, 171-72 (2d Cir. 1999); see also NTEU, 513 U.S. at 480* (O'Connor, J., concurring in part and dissenting in part) ("The time-tested *Pickering* balance, most recently applied in *Waters*, provides the governing framework for analysis of all manner of restrictions on speech by the government as employer.")

Application of the test is somewhat different, however, where the restraint at issue prohibits speech before it occurs. The Supreme Court emphasized in *NTEU* that such restraints "give rise [] to far more serious concerns than could any single supervisory decision." *NTEU*, 513 U.S. at 468. In this situation, the Government must demonstrate "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expressions are outweighed by that expression's 'necessary impact on the actual operation' of the Government." Id. at 468 (quoting *Pickering*, 391 U.S. at 571). In meeting this burden, the government must "'demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" 513 U.S. at 475 (citation omitted).

Defendants attempt to avoid the application of the stricter *NTEU* standard by maintaining that the NYPD uniform is a nonpublic forum; i.e., that the government has a significant interest in regulating the wearing of the NYPD uniform in public. (See Def. Mem. at 20.) The Court does not doubt the importance of this interest, but notes that the defendants have failed to justify their allowing some groups, but not the LOA, to wear the NYPD uniform in parades. Numerous fraternal, social, and ethnic organizations routinely march in parades in NYPD uniform. (See Stip. ¶ 12.) The Court will therefore apply the stricter NTEU standard.

2. Plaintiffs' First Amendment Interests

Speech is a matter of public concern, and triggers First Amendment protections, if the speech "relates to any matter of political, social, or other concern to the community," *Connick, 461 U.S. at 146; Sheppard v. Beerman, 18 F.3d 147, 151 (2d Cir. 1994)* (citing *Connick*).

The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees,* 468 *U.S. 609, 622, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984).* Marching in a public parade is an inherently expressive activity. See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 568-69, 132 L. Ed. 2d 487, 115 S. Ct. 2338 (1995).*

The Court concluded in its 1998 Order that "The LOA's expressive and associational goals clearly implicate the First Amendment." (1998 Order, at *3.) The LOA was formed "to promote the ideals, goals and interests of its membership, including the alleviation of discrimination in the Police Department of the City of New York." (Compl. ¶ 4.) Numerous newspaper articles submitted by plaintiffs attest to the prominent role played by the LOA in speaking publicly about alleged discrimination in the police force.[4] The message that plaintiffs seeks to convey is not merely that they are proud to be Latino and police officers, as

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[4] See Affirmation of Christopher Dunn, May 12, 1999, at 4 (article concerning LOA support for police officer fired for exposing alleged corruption), 10 (article discussing LOA's criticism of police tactics in wake of shooting of Amadou Diallo), 20 (article profiling plaintiff Anthony Miranda, "president of the feisty Latino Officers Association and chief antagonizer of the NYPD hierarchy," and noting his $96,000 judgment against the NYPD), and 57 (article noting LOA reaction to study showing that minority officers were disciplined at a higher rate than white officers).

defendant suggest (see Def. Mem. at 14), but that they are willing to criticize the NYPD publicly for alleged discrimination (see Affidavit of Anthony Miranda, May 13, 1999, ¶ 5). Defendants rely on *Fighting Finest, Inc. v. Bratton, 95 F.3d 224 (2d Cir. 1996)*, to suggest that the NYPD has the discretion to make judgments about which groups to recognize and which to decertify. (See Def. Mem. at 20-21.) *Fighting Finest*, however, involved a recreational boxing team; the interests of a sporting group do not implicate First Amendment protection in the same way as the interests of an organization that views its mission as fighting discrimination.

Promoting dialogue concerning discrimination in law enforcement is certainly an issue on which "free and open debate is vital to informed decision-making by the electorate." *Pickering, 391 U.S. at 571-72.* As plaintiff Anthony Miranda has explained, by marching in uniform, "the LOA can convey to members of the public -- and particularly to members of minority communities -- that there are substantial numbers of police officers who share their concerns about discrimination and police misconduct." Affidavit of Anthony Miranda, May 13, 1999, ¶ 6; see also *United Yellow Cab Drivers Ass'n v. Safir, 1998 U.S. Dist. LEXIS 7742, 98 Civ. 3670 (RPP), 1998 WL 274295, at *3 (S.D.N.Y. May 26, 1998*) (allowing cab drivers to "use the means of their livelihood, yellow cabs, to symbolize their protest"). This message clearly relates to matters of social and political concern, and hence, of public concern.

3. Defendants' Countervailing Interests

Under *NTEU*, defendants bear the burden of demonstrating how the LOA's expressive activities will have a "'necessary impact on the actual operation' of the Government." *NTEU, 513 U.S. at 468* (quoting *Pickering,*

391 U.S. at 571). Defendants identify two principal interests behind the parade policy: first, the need of the NYPD to promote the appearance and reality of harmony and discourage rivalries within its ranks (see PBM 30); and second, to conserve the resources of the NYPD's Ceremonial Unit (see Def. Mem. at 4).

As to the first justification defendants have identified, the parade policy has little effect in furthering the NYPD's goals of promoting harmony within the NYPD, and projecting to the public an image of harmony within the NYPD. Prohibiting plaintiffs from marching appears to have little effect on preserving police harmony itself. Whether or not defendants allow the LOA to march in a public parade, the LOA has, since 1996, existed as a prominent organization composed of numerous NYPD officers who publicly express the view that the Hispanic Society does not pursue their goals effectively. As the Court noted in its 1997 Order, "There is no evidence that suppressing the LOA's ability to march in uniform has achieved unity or that allowing the LOA to march in uniform will increase disunity." (1997 Order, at *5.)

As to defendants' interest in projecting the image of harmony within the NYPD, defendants have not shown how any public perception of separate marching by members of the LOA and members of the Hispanic Society would undermine the NYPD's image of harmony any more than letting, e.g., African-Americans (the Guardians Association) march separately from Caucasians. The existence of two organizations representing the same, broadly defined, ethnic group does not convey a more powerful message of police disunity than the existence of several organizations representing many different ethnic or religious groups. Defendants cannot, therefore, draw a distinction between plaintiffs and other groups based on

defendants' interest in fostering a public perception of police harmony.[5]

Defendants' second justification is that recognizing the LOA would have a "'necessary impact on the actual operation.'" *NTEU, 513 U.S. at 468* (quoting *Pickering, 391 U.S. at 571),* of the NYPD because it would require the expenditure of time by the Ceremonial Unit, which has the function of reviewing and mustering any marching officers to ensure that they are wearing no inappropriate adornments and are conducting themselves appropriately. (See Def. Mem. at 4.) Defendants never explain, however, how much, if any, additional time or effort would be required to review and muster LOA members. In fact, there is no basis in the record to conclude that there will be any more marching officers to review and muster if the officers march as LOA members rather than as Hispanic Society members. Defendants have failed to show, therefore, that any demands placed on the Ceremonial Unit are substantial enough to outweigh plaintiffs' right to march in uniform. The remaining operational burdens cited by defendants appear to be separable from whether the

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[5] Plaintiffs also contend that defendants have not applied their parade policy in a consistent fashion because for the past four or five years, in that defendants have allowed the Dominican Officers' Association to march in uniform behind their organizational banner in the annual Dominican Day Parade. (See Affidavit of Anthony Miranda, May 6, 1999, ¶ 14.) Defendants contend that they are unaware of, and have not authorized, such activity, with the exception that they permitted the Dominican Officers' Association to march separately in 1997 because they believed they were required to do so by the Court's 1997 Order. (See Def. Mem. at 9, 23.)

LOA members should be permitted to march in uniform behind their banner, and need not be addressed at this stage in the litigation.

Because defendants have failed to demonstrate how allowing the LOA to march in a public parade in uniform behind their organizational banner would have any significant impact on the actual operation of the NYPD, they have also failed to demonstrate how any such impact would outweigh plaintiff's First Amendment rights. Plaintiffs, in contrast, have demonstrated a likelihood of success on the merits, and are entitled to the relief requested.

III. Conclusion

For reasons stated above, plaintiffs' motion for a preliminary injunction is granted. [Docs. Nos. 43, 53.] Defendants are hereby enjoined from prohibiting plaintiffs from marching in uniform and behind their organizational banner, in the Manhattan Puerto Rican Day Parade on June 13, 1999; the Dominican Day Parade tentatively scheduled for August 8, 1999; the Brooklyn Puerto Rican Day Parade, tentatively scheduled for August 15, 1999; the Desfile de Hispanidad de Queens, tentatively scheduled for September 12, 1999; and Desfile de Hispandid, Fifth Avenue, tentatively scheduled for October 10, 1999.

SO ORDERED

Dated: New York, New York
June 8, 1999
Kimba M. Wood
United States District Judge

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1 . . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

PERSONNEL BUREAU MEMO

Subject: GUIDELINES AND REQUESTS FOR OFFICIAL RECOGNITION OF RELIGIOUS, FRATERNAL, AND ETHNIC ORGANIZATIONS BY THE NEW YORK CITY POLICE DEPARTMENT

DATE ISSUED: 5-13-98

NUMBER: 30

1. Throughout the history of the New York City Police Department religious, fraternal, and ethnic organizations have served to promote the ideals and goals integral to the success of the mission of the Department. To ensure that these organizations serve the best interest of the Department guidelines have been created whereby such organizations will be officially recognized. To be officially recognized by the Department, the purpose or mission of the organization must be consistent with the goals and mission of the New York City Police Department. OFFICIAL RECOGNITION OF AN ORGANIZATION IS AT THE SOLE DISCRETION OF THE POLICE COMMISSIONER.

* * * *

NOTE In order to promote harmony within the Department, discourage rivalries between groups of officers and conserve the resources of the Department hierarchy in meeting with and supervising the activities of recognized organizations, the Department discourages the formation of multiple organizations which purport to serve the same goals and missions. If an already recognized group has a similar purpose to the requesting organization, a statement addressing the distinctions between the groups must be included. Additionally, this information should include a statement as to whether membership is open to members of the New York City Police Department only,

and where applicable, whether the requesting organization represents a substantial number of the members of the Department whose interests the requesting organization represents.

* * * *

2. All recognized organizations may use the name "New York City Police Department", and all of the associated logos, emblems, and banners, solely at the discretion of the Police Commissioner. Without official recognition, or other specific permission, the name or any associated logos, etc., may not be used. This authority and permission may be revoked at any time.

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